Supreme Court, U.S.
FILED
081424 MAY 14 2009
OFFICE OF THE CLERK

No.: 08A783

IN THE

Supreme Court of the United States

LOUIS R. ROSENTHAL,

Petitioner,

v.

NEW YORK SUPREME COURT
APPELLATE DIVISION, THIRD JUDICIAL
DEPARTMENT, COMMITTEE ON
PROFESSIONAL STANDARDS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION - THIRD DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Appellate Division by resolving disputed issues of material facts in lieu of ordering a referee to resolve them and in resolving pertinent questions of law in lieu of appointing a special panel to determine them, violate Petitioner Louis R. Rosenthal's right to a hearing as guaranteed by the by the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

PARTIES TO THE PROCEEDING

The Petitioner is Louis R. Rosenthal, an attorney who has been suspended from the practice of law without a hearing.

The Respondent in this proceeding is Mark S. Ochs, Esq. (in his capacity as Chair of the Committee on Professional Standards of the Third Judicial Department).

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OPINIONS AND ORDERS BELOW

The opinions and orders of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department ("Third Department") and New York State Court of Appeals ("Court of Appeals") are reported at Matter of Louis R. Rosenthal, 57 A.D.3d 1085, 868 N.Y.S.2d 820 (3rd Dept. 2008), *leave to appeal denied*, 12 N.Y.3d 739, 904 N.E.2d 501, 876 N.Y.S.2d 347 (2009).

All opinions and orders are set out in the Appendix starting at App. A.

JURISDICTION

This Court has jurisdiction to review by writ of certiorari "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." 28 U.S.C. § 1257(a).

Petitioner seeks review of the Third Department's order suspending his right to practice law in New York which, as demonstrated below, violated the Fifth and Fourteenth Amendments to the Constitution of the United States.

This Petition is timely in that it has been filed within (90) days after entry of the Judgment of the Court of Appeals, the state court of last resort with discretionary review (February 17, 2009).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The relevant portions of the U.S. Const. Amend. V and XIV are set out in the Appendix starting App. D.

STATEMENT OF THE CASE

The Committee on Professional Standards, Third Judicial Department, received a sua sponte a complaint from the Grievance Committee of the Second and Eleventh Judicial Districts pursuant to an Order of the Appellate Division, Second Judicial Department dated May 23, 2005.

On November 21, 2005, the Committee requested that Respondent Rosenthal submit a written statement of his position and response to (4) allegations. On or about January 19, 2006, Respondent Rosenthal submitted a response, which vigorously contested the allegations. Up until the approximate date of December 13, 2007, Respondent Rosenthal did not hear from the Commission regarding his response.

The Committee on Professional Standards, Third Judicial Department commenced this matter on or about December 13, 2007, pursuant to 22 NYCRR, Part 806, for a determination sustaining the charges of professional misconduct set forth in its petition and for an order imposing appropriate discipline for the charges that may be sustained. The Notice of Petition provided that "upon receipt of your verified answer the undersigned will apply to the

Appellate Division, on notice to each of you, for an order referring any issues to a referee to hear and report, or for such other and further relief as may be just and appropriate." On or about January 26, 2008, Respondent Louis R. Rosenthal interposed a Verified Answer to the Petition.

On February 27, 2008, Petitioner Committee moved for an Order pursuant to Section 806.5 of the Rules of Appellate Division, Third Judicial Department, declaring that no factual issues were raised as to Respondent Louis R. Rosenthal and that a time be fixed for Respondent Louis R. Rosenthal to be heard in mitigation. Respondent Louis R. Rosenthal filed opposition to the motion on or about March 14, 2008. On August 25, 2008, the Third Department granted Petitioner Committee's motion.

After hearing statements in mitigation, the Third Department issued a memorandum and order finding Louis R. Rosenthal guilty of charges II and III of the petition of charges as charged and specified, and suspended Louis R. Rosenthal from the practice of law for a period of two years.

Petitioner, Louis R. Rosenthal, did not request leave of the Appellate Division to appeal to the Court of Appeals. On or about January 14, 2009, Louis R. Rosenthal served and filed a motion seeking leave to appeal to the Court of Appeals and for a stay of enforcement of the Third Department's order Dated December 4, 2008. Petitioner Rosenthal's raised the claim that the decision of the Third Department violated his right to a hearing as guaranteed by the due process clause of Article 1, §6 of the New York

State Constitution and by the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

On February 17, 2009, the New York State Court of Appeals denied Petitioner Rosenthal's motion for leave to appeal without opinion and dismissed the stay as academic.

There is no question that the Appellate Division, Third Judicial Department's order dated December 4, 2008 suspending Petitioner from practicing law for two years is a final order (Matter of Zalk, 9 N.Y.3d 958, 877 N.E.2d 302 [2007]). If it was a non-final order the Court of Appeals of New York State would have dismissed his motion for leave to appeal on the grounds that the order sought to be appealed from does not finally determine the proceeding within the meaning of the New York State Constitution. The Court of Appeals denied the motion for leave to appeal under its discretionary power to review.

REASONS FOR GRANTING THE WRIT

Effective with appeals taken on and after January 1, 1986, the New York Legislature amended the Court of Appeals' civil jurisdiction. Like many other state courts of last resort, the New York Court of Appeals became certiorari and can deny in discretion. This case creates an opportunity to address the trend in state courts of last resort control over civil dockets and concentration on cases that only it perceives as significant. Such an opportunity provides this Court with an outlet to prevent state courts of last resort to deny review of situations

where there are violations of substantial rights that are guaranteed under the United States Constitution.

State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of state court against a litigant, the binding force and effect of which is collateral estoppel, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant who rights have thus been adjudicated has been heard as a requisite to the due process which the Constitution prescribes.

It is a principal of general application in jurisprudence that one is not bound by ε judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteen Amendments requires.

The issue presented by this certiorari petition is analogous to the a determination of a motion for summary judgment: it is finding if there exists disputed material issue of fact as opposed to issue determination. A comparison of the Charges against Rosenthal with the verified answer thereto establishes that there were may issues of disputed material facts and legal arguments made which

either precluded or nullified the facts in the charges.

The Appellate Division, Third Judicial Department's Memorandum and Order is permeated with references to facts found in the Court of Appeals decision of Matter of Feinberg, 5 N.Y.3d 206, 216, 833 N.E.2d 1204, 800 N.Y.S.2d 592 (2005), which affirmed the Commission on Judicial Conduct's determination that Judge Feinberg be removed from his judicial office as Surrogate of Kings County. Though Respondent Rosenthal was a witness in that proceeding, neither the doctrine of *Res Judicata* nor collateral estoppel foreclose him from challenging the issues of fact or law in that proceeding. *Res judicata* does not apply because he was not a party to the proceeding. The doctrine of collateral estoppel does not apply to him because there are but two necessary requirements for the invocation of the doctrine of collateral estoppel, namely: there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling. See Allen v. McCurry, 449 U.S. 90, 95, 101 S.Ct. 411 (1980); Montana v. United States, 440 U.S.147, 153, 99 S.Ct 970 (1970); Blonder-Tongue Labratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-329, 91 S.Ct. 1434, 1442-1443 (1971). The doctrine of collateral estoppel may not be invoked in this proceeding against Respondent Rosenthal because he did not have a full and fair opportunity to contest the aforesaid decision removing Judge Feinberg from office, notwithstanding that he appeared in said proceeding as a witness for the Commission on Judicial Conduct.

Fabian G. Palomino, Esq. and Barry Kamins, Esq. jointly represented Rosenthal when he testified as a witness in Judge Feinberg's judicial conduct proceeding. The Referee, Judge Felice K. Shea, made it emphatically clear that other than asking for a recess to consult with Rosenthal on the law, the attorneys for Rosenthal could not object or otherwise participate in that proceeding on Rosenthal's behalf with the following admonition before Rosenthal was sworn as a witness:

> THE REFEREE: I just want to advise both of you that you are welcome to be here, as is the witness, of course, but the attorneys are not permitted to participate in the proceeding. You of course can ask for a recess and consult with your client, but I will not permit any objections or other participation on your part.
>
> MR. PALOMINO: Yes Your Honor.
>
> THE REFEREE: Is there any question about that?
>
> MR. PALOMINO: No, Your Honor.
>
> THE REFEREE: All right, Mr. Rosenthal.

(See P. 601, Transcript of the hearing before the Commission on Judicial Conduct; see also POINT II, P. 8, Memorandum of Law In Support of Respondents Feinberg and Rosenthal's Verified Answers). In not being a party to that proceeding Rosenthal did not have the right to appeal its determination.

Recognizing the unavailability of the doctrine

of collateral estoppel, in paragraph 20 of its affirmation in support of its motion for an order declaring that no factual issues are raised by Rosenthal, the Committee on Professional Standards submitted "that all issues raised in the within proceeding have been previously admitted by respondent Rosenthal in his testimony before Judge Shea and the New York State Commission on Judicial Conduct on January 8, 2004." This sweeping, conclusory assessment is untenable. As will be demonstrated hereinafter the issues of fact and law raised by Rosenthal in the instant proceeding do not contradict any admissions he made before the Commission on January 8, 2004. Those issues of fact and law were proffered by Rosenthal to establish either there was no such admission as is attributed to him, or, to put his admission in a context that establishes that they are not entitled to the factual or legal conclusions found by the Appellate Division in its Memorandum and Order dated December 4, 2008 relating to Rosenthal. As there were such disputed issues of fact raised, Rosenthal was entitled to a hearing before a referee where he could produce witnesses and other evidence to provide them.

Charge II, which Rosenthal was found guilty of violating commences as follows: "IN VIOLATION OF DISCIPLINARY RULE 2-106(A) & (C)(3). . . RESPONDENT IN HIS CAPACITY AS COUNSEL TO THE PUBLIC ADMINISTRATOR OF KINGS COUNTY CHARGED AND COLLECTED EXCESSIVE FEES. . ." There could be no such admission by Rosenthal before the Commission on Judicial Conduct on October 7, 2008. The subject of the violations of New York Disciplinary Rule 2-106(A) & (C)(3) were never brought up at that hearing before the Commission on Judicial Conduct. Furthermore,

Rosenthal legally and factually disputed the charge. He contended legally that Disciplinary Rule 2-106(A) & (C)(3) were only applicable to the usual lawyer client situation were the lawyer negotiates directly with the client in setting and collecting the fee. It recognizes that in such a relationship, the lawyer is in a dominant position and might take advantage of his or her client and was enacted to discourage that possibility.

Rosenthal pointed out that factually it is inapplicable to an attorney for the Public Administrator. Such attorney's client is the Public Administrator, but he does not negotiate his fee with the client. To get his fee in each estate, he must apply to the court and it is up to the court to determine how much, if any, fee is to be awarded. Respondent Rosenthal also pointed out that the court was responsible for awarding him fees in the absence of an affidavit of legal services. The Court of Appeals made this clear in its decision removing Feinberg: "From January 1997 until mid May 2002, petitioner never required Rosenthal to submit an affidavit of legal services before approving a fee request. . ." Matter of Feinberg, supra at 212.

The above disputed questions of law and fact are in paragraphs "1," "2" and "4" of Rosenthal's verified answer to the charges. Rosenthal never admitted before the Commission before Judicial Conduct that he received excessive fees.

It should be noted that the Attorney General has no power to limit fees to be paid to an attorney for the Public Administrator. The way this was usually accomplished was that the Attorney General would negotiate a limitation with the Surrogate and the Surrogate would enter into an agreement with

the attorney for the Public Administrator before he was appointed or continued to accept such limitation.

When Judge Feinberg began serving as Surrogate in 1997, he was unaware of the practice and then Attorney General, Dennis Vacco, didn't contact him. Judge Feinberg requested Rosenthal to limit his fee to 8% of each estate to be paid as follow: 6% when he filed his first judicial accounting, and the remaining 2% when he filed his final decree. Judge Feinberg learned from Surrogate Nathan Sobel that this was the established limitation in Brooklyn. Rosenthal, who had received the same information from Robert Adler, Esq., a partner in Hesterberg & Keller, the former counsel to the Public Administrator, accepted. (Paragraph 17 of the Affirmation of Feinberg and Rosenthal in opposition to Petitioner's motion).

That the 8% fee was the prevailing rate in Brooklyn is acknowledged by this Court in its decision removing Judge Feinberg: ". . .the Attorney General twice in the past attempted to rein in counsel fees approved by the Kings County Surrogate, reaching agreements in 1988 and 1994 with then counsel to limit the fee awards to six percent of an estate's value, with additional payments in special cases." Id. at 210. This was written so to make it appear that the 8% fee was obtained only in special cases. This is not accurate. It is paraphrasing finding "25" found on page 25 of the Referee's Report, which makes it clear that under the agreements an award of an 8% fee was the rule, rather than an exception. It is as follows:

> The Office of the Attorney General of the State of New York attempted to place a cap of 6% on the fees of Kings County Counsel to the Public

> Administrator in order to conform Counsel in Brooklyn with the fees awarded by Surrogates in the other four counties of New York City. In both the 1988 and 1994 agreements the maximum fee was set at 6%. However, Hesterberg and Keller negotiated a proviso under which they could apply for additional fees under some circumstances. In practice, an additional 2% fee was regularly applied for (Tr. 818-819). . . Surrogate Bernard M. Bloom generally granted the request and set the fees in most fee generating cases at 8% (Tr. 822). . . Nonetheless, Surrogate Bloom did not grant 8% automatically (Tr. 758, 799, 822, 836-837).

In Matter of Feinberg, supra, the Court of Appeals states: "The Commission adopted the Referee's finding of fact and conclusions of law, adding the violation of 22 NYCRR 100.2(B) for conveying the appearance of impropriety and favoritism by. . . setting fees greater than those granted in other New York City counties. The Commission determined that removal was the appropriate sanction." Id. at 213-214. The Court of Appeals agreed with the Commission's conclusion that the ". . . conduct conveyed the appearance of impropriety. . ." Id. at 214. Thus, according to that decision, the 8% fee is not excessive, but creates the appearance of impropriety and favoritism because it is greater than those granted in the other New York City Counties.

The Specification in support of Charge II states that between January 1997 and through May 2002 Rosenthal "failed to comply with SCPA § 1108(2)(c), which requires that before any fee is considered and approved by the Surrogate, counsel to the Public Administrator submit an affidavit of legal services. . ." Respondent Rosenthal disputed this specification

legally and factually. It is a misrepresentation of what that provision requires. It does not even mention the counsel to the Public Administrator or require him or her, before any fee is considered and approved, to submit an affidavit of legal services. To the contrary, it provides: "Any legal fees allowed by the court pursuant to paragraph (b) of this subdivision shall be supported by an affidavit of legal services. . ." SCPA § 1108(2)(c). As noted by this Court in the Matter of Feinberg, supra. at 212, SCPA § 1108(2)(c) puts the burden upon the court not to award a fee in the absence of an affidavit of legal services: "From January 1997 until mid-May 2002, petitioner never required Rosenthal to submit an affidavit of legal services before approving a fee request. Said affirmative defense appears in paragraph "4" of Respondent Rosenthal's Verified Answer to the Petition.

Rosenthal disputed the absent affidavits legally and factually on the ground that such deficiency was cured by the filing of *nunc pro tunc* affidavits of legal services containing the information called for by the statutory provision, which satisfied the statutory purpose or providing evidence to the beneficiaries of the estates that they were paying only for the actual cost of administering the estates. (See paragraph "4" of Rosenthal's Verified Answer).

Specification "3" in support of Charge II, states that after Rosenthal submitted the affidavits of legal services to Judge Feinberg, "not a single fee was adjusted." This mirror's an assertion in this Court's decision in Matter of Feinberg, supra at 213. Presumably, this observation is made to discredit those affidavits *nunc pro tunc* by implying that Surrogate Feinberg did not review them at all or improperly reviewed them. Such implication is

legally untenable. Those affidavits were entitled to a general presumption of regularity. See Matter of Marcellus, 165 N.Y. 70, 77, 58 N.E. 796 (1900); see also People v. Dominique, 90 N.Y.2d 880, 684 N.E.2d 27, 661 N.Y.S.2d 597 (1997); People v. Harrison, 85 N.Y.2d 794, 796, 652 N.E.2d 638, 628 N.Y.S.2d 939 (1995); People v. Phelps, 74 N.Y.3d 919, 549 N.E.2d 461, 550 N.Y.S.2d 259 (1989); Matter of Evans, 264 A.D.2d 482, 694 N.Y.2d 453 (2nd Dept. 1999); Virag v. Hynes, 54 N.Y.2d 437, 443, 430 N.E.2d 1249, 446 N.Y.S.2d 196 (1981); Matter of Whitman, 225 N.Y. 1, 9, 121 N.E. 479 (1918). "Substantial evidence" is required to overcome the presumption of regularity. See People v. Robinson, 191 A.D.2d 523, 595 N.Y.S.2d 56 (2nd Dept. 1993) *lv denied* 81 N.Y.2d 1018, 616 N.E.2d 864, 600 N.Y.S.2d 207 (1993). (See Paragraph "14" of Rosenthal's Verified Answer).

In addition, there was independent corroboration of the fact that the *nunc pro tunc* affidavits contained reasonable fees for each estate involved. As noted, the affidavits were sent to the Attorney General's Office and were reviewed and that office found that the fees in them were reasonable and should not be changed. In its Memorandum and Order suspending Respondent Rosenthal, the Appellate Division deals with this independent corroboration by the Attorney General, stating: "Respondent asserts that review of the affidavits by the Attorney General did not result in any adjustment either." This flippant attempt to depreciate the significance of that independent corroboration is unavailing.

The evidence in support of this independent corroboration went beyond the fact that the Attorney General's review of those affidavits did not result "in any adjustment either." A meeting was held in the

Spring of 2003 in the jury room of the Surrogate's Court in Kings County, attended by a representative of the Attorney General's Office and Harvey Greenberg, Esq., Judge Feinberg's then attorney. Initially, the subject of the discussion was cases filed under the guidelines established by the Administrative Board of the Public Administrators in October, 2002. A few objections of the Attorney General's in relation to cases filed under the new guidelines were settled and withdrawn. Ms. Gelman, the Attorney General's representative was then specifically asked as to whether that office would file any objections to any of the closed cases. She replied that they would not file any objections to the closed cases, but would file objections in future cases if they did not comply with the guidelines. This exchange established that the Attorney General's review of the *nunc pro tunc* affidavits found the fees charged were reasonable or she would have stated her objection and tried to reach a settlement and have her objections withdrawn. She then observed that the affidavits of service prepared by Rosenthal were the best in the City. (See paragraph "16" of Rosenthal's Verified Answer).

The Appellate Division's conduct with respect to the *nunc pro tunc* affidavits serves to underscore and reinforce Respondent's contention on this motion: that it resolved disputed issues instead of appointing a Referee to hear them.

Specification 2 in support of charge 2 states: "Respondent's systematic failure to comply with SCPA § 1108(2)(c) from January 1997 through December 2002 resulted in his receipt of $8,613,000.35." Rosenthal disputed this specification factually for various reasons. He did not receive that sum because of his failure to file affidavits of legal

services. The sum of over $8.6 million is a gross sum, which is so large that it creates the impression that Rosenthal was the recipient of the unearned windfall. To dispute this misleading impression, Rosenthal put it in context by pointing out that he received the amount as a percentage of over $100 million in revenue that his firm skillfully generated for the benefit of the City and State of New York. In addition, this Court in affirming Judge Feinberg's removal stated that the gross amount that Rosenthal netted "about $1,935,000.00." Matter of Feinberg, supra at 213. Rosenthal disputed this net figure and stated that it was considerably less and pointed out various expenses that he incurred to generate that revenue of which the Court of Appeal was not aware. (See Paragraphs 8 through 12 of Rosenthal's Verified Answer).

In its Memorandum and Order of the Appellate Division states: "We also note the condemnatory language set forth in the Court of Appeals decision removing the Surrogate and stating that the taint of favoritism in the matter was strong. . ." Matter of Rosenthal, supra at 1086. The hyperbolical tome of that language is rendered nugatory by the following finding of the Referee, Judge Shea, in her Report:

> I find that the favoritism portion of the charge against respondent had not been proven by a preponderance of the evidence. There is no evidence that Mr. Rosenthal was not qualified to do the job he was appointed to do, although the Commission argues that his experience in Surrogate's Court matters had not been extensive. There was no evidence that Mr. Rosenthal did not perform his duties in a diligent and competent manner, other than his failure to file affidavits of legal services as

> required by law. I find that respondent's misconduct in failing to require affidavits of legal services from Mr. Rosenthal was not shown by the evidence to have been rooted in favoritism. I find further that respondent's award of excessive fees was likewise not shown to be motivated by a desire to benefit Mr. Rosenthal because be was a friend. Respondent abided by the split fee arrangement Mr. Rosenthal made with prior Counsel in cases where both attorneys had provided services. Respondent could, as he argues, have awarded even higher fees to Mr. Rosenthal. The credible evidence leads to the conclusion that respondent mistakenly and impermissibly thought he was entitled to apply what he understood to be an automatic customary 8% rule in Kings County for awarding legal fees in Public Administrator cases. . . Accordingly, I decline to find misconduct was committed based on the relationship of the Respondent and Mr. Rosenthal.

(See Referee's Report of Felice K. Shea pages 19-20, which is attached to Petitioner Motion for a declaration that no factual issues exist as Exhibit "B").

In resolving this disputed issue of fact against Rosenthal, rather than appointing a referee to resolve it, the Appellate Division glossed over it by stating that of the $8,613,009.35 awarded to Rosenthal "a little less than one fourth was net income to Respondent. See Matter of Rosenthal, supra at 1086.

Charge III states: "IN VIOLATION OF DISCIPLINARY RULE 6-101(A)(2) OF THE CODE

OF PROFESSIONAL RESPONSIBILITY, [22 NYCRR §1200.301], RESPONDENT HANDLED LEGAL MATTERS WITHOUT PREPARATION ADEQUATE IN THE CIRCUMSTANCES." Rosenthal disputed this specification. He had read SCPA § 1108 and was aware if the provision for affidavits of legal services. He prepared his resume and called a staff meeting to inform them of it and to submit it to the court, but Rudolf J. Karvay, Esq., an experienced attorney he had hired from Hesterberg & Keller told him that the Surrogate's Court did not require the affidavits of legal services. Though skeptical, he this bad advice with the expectation that the Court would reject the papers if they were inadequate. (See Paragraph 19 of Rosenthal's Verified Answer and Rudolf J. Karvay, Esq.'s affidavit attached as an Exhibit to the Answer.). As noted previously, this Court held that during all of the years that Judge Feinberg did not require Rosenthal to submit an affidavit of legal services before approving a fee request. See Matter of Feinberg, supra at 212.

Specification 1 in support of Charge III asserts that from January 1997 through May 2007 Rosenthal regularly requested a 6% fee from estates when he filed the accounting and thereafter routinely requested an additional 2% when he submitted a final decree making a total for 8% of the dollar amount of the appreciated value of the estate. Rosenthal admitted the accuracy of this specification. However, he pointed out that it was legally justified because that fee and manner of payment had been fixed by Judge Feinberg. The 1988 and 1994 agreements with the Attorney General permitted the aforesaid. (See Paragraph "20" through "23" to Rosenthal's responses to the Motion for an Order declaring that no factual issue exist).

Specification 2 in support of Charge III asserts that Rosenthal made fee requests upon post-it notes. Respondent disputed that his fee requests were made upon an accounting or an amended accounting. The post-it notes were made to assure the court that the fee request did not exceed 8% of the appreciated value of the estate. (See Paragraph 25 of Rosenthal's Verified Answer.)

CONCLUSION

Petitioner Louis R. Rosenthal has been deprived of a fundamental procedural due process right to a fair hearing, which resulted in a loss of Petitioner's liberty or property.

It is perplexing that the Appellate Division engaged in such conduct in light of the obvious dispute in the facts and legal questions raised. A possible motive exists for the Appellate Division to have engaged in such conduct. All of the Charges, except for Charge V, against the three respondents in the Disciplinary Proceeding were based on the 2005 decision of the Court of Appeals that upheld the split decision of the Commission on Judicial Conduct, which recommended that Michael H. Feinberg be removed as Surrogate Judge of Kings County (Matter of Feinberg, 5 N.Y.2d 206, 800 N.Y.S.2d 529 (2005). This resulted in Feinberg being precluded from challenging those findings in the disciplinary proceeding under the doctrine of *res judicata*. See Matter of Intemann, 165 A.D.2d 974, 562 N.Y.S.2d 241 (3rd Dept. 1990); Matter of Capshaw, 266 A.D. 345, 42 N.Y.S.2d 397 (1st Dept. 1943), *aff'd* 292 N.Y. 687, *cert denied* 323 U.S. 751, *reh denied* 323 U.S. 816. Indeed, that doctrine was applied and Feinberg was disbarred in the disciplinary proceeding. See Matter of Feinberg, supra.

However, what may not have been recognized until Petitioner's verified answer was filed was that Rosenthal was not bound by the doctrine of *res judicata* or collateral estoppel, which the Respondent has conceded. As a result, Petitioner was free to – and did – dispute factually and legally the findings in that decision which formed the basis of the charges against him. Further, since they knew the basis of his factual disputes to the charges and the nature of his legal challenges; that if given a hearing at which he could sustain them, it could be raise serious question about some of the bases for its removal of Feinberg as Surrogate of Kings County.

A writ of certiorari should issue so that this Court may consider the matter on its merits.

Respectfully submitted,

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APPENDIX A
Unpublished Decision and Order on Motion by the Appellate Division - Third Department (Dated August 15, 2008)

SUPREME COURT OF NEW YORK, APPELLATE DIVISION,
THIRD DEPARTMENT

Present: Mercure, J.P., Spain, Rose, Kane and Stein

In the Matter of MICHAEL H. FEINBERG, LOUIS R. ROSENTHAL, and STEPHEN F. CHEPIGA, Attorneys.

COMMITTEE ON PROFESSIONAL STANDARDS,
Petitioner;

MICHAEL H. FEINBERG, LOUIS R. ROSENTHAL, and STEPHEN F. CHEPIGA,
Respondents.

Motion by petitioner for an order, pursuant to section 806.5 of the Rules of this Court, declaring that no factual issues are raised by the pleadings in this disciplinary proceeding and fixing a time which respondents may be heard in mitigation or otherwise. Cross-motion by respondent Stephen Chepiga for an order pursuant to section 806.5 of the Rules of this Court declaring that no factual issues are raised in petitioner's petition and dismissing petitioner's

petition as to respondent Stephen F. Chepiga and fixing a time at which respondent may be heard in support of dismissal of petitioner's petition as it applies to respondent Stephen F. Chepiga.

Upon reading and filing the notice of motion and support affidavits of Michael G. Gaynor, staff attorney of the Committee on Professional Standards, dated March 13, 2008, the responsive affirmation on behalf of respondents Michael H. Feinberg and Louis R. Rosenthal by Fabian G. Palomino, Esq., dated March 14, 2008, the notice of cross motion by respondent Chepiga and affirmation in opposition to petitioner's motion and in support of cross-motion by Peter V. Coffey, Esq., dated March 14, 2008, including a request for oral argument on the cross-motion, and a memorandum of law by Englert, Coffey, McHugh and Fantauzzi, Schenectady, in support of the cross-motion, dated March 14, 2008, and the affidavit in opposition to the cross motion by Michael G. Gaynor, Esq., dated April 1, 2008, it is hereby

ORDERED that the motion by petitioner Committee on Professional Standards, is granted, and it is further

ORDERED that the cross-motion by respondent Stephen F. Chepiga and the request for oral argument thereof if denied, and it is further

ORDERED that respondents may be heard in mitigation or otherwise before the Court at a time and place to be fixed by the Clerk.

Mercure, J.P., Spain, Rose, Kane and Stein, JJ., concur.

ENTER:

MICHEL J. NOVACK
CLERK OF THE COURT

APPENDIX B
Memorandum and Order of the Appellate Division - Third Department (Dated December 4, 2008)

SUPREME COURT OF NEW YORK,
APPELLATE DIVISION,
THIRD DEPARTMENT

Present: Mercure, J.P., Spain, Rose, Kane and Stein

In the Matter of LOUIS R. ROSENTHAL, an Attorney.

COMMITTEE ON PROFESSIONAL STANDARDS,
Petitioner;

LOUIS R. ROSENTHAL,
(Attorney Registration No. 1079649)
Respondent.

Per Curiam.

Respondent was admitted to practice by the Appellate Division, Second Department, in 1967. He maintains an office for the practice of law in Brooklyn.

Petitioner charges that respondent, while serving as counsel to the public administrator of Kings County, engaged in professional misconduct.

Having issued an order declaring that no factual issues are raised by the pleadings with respect to respondent and having heard respondent in mitigation (*see 22 NYCRR 806.5*), we now find him guilty of the following professional misconduct.

In his capacity as counsel to the public administrator of Kings County, respondent charged and collected excessive fees, in contravention of *SCPA 1108 (2) (c)* and in violation of the Appellate Division disciplinary rules (*see* Code of Professional Responsibility DR 2-106 [a], [c] [3] [*22 NYCRR 1200.11 (a), (c) (3)*]) (charge II). Specifically, respondent was appointed counsel to the public administrator in 1997 and then, for a period of about five years, he failed to comply with a 1993 amendment to *SCPA 1108 (2)* which requires that before any fee is considered and approved by Surrogate's Court, counsel to the public administrator must submit an affidavit of legal services detailing the services rendered, time spent, and the method or basis by which compensation is requested. The 1993 amendment was part of a reform effort stemming from an investigation of abuse of compensation to such counsels by the New York State Attorney General and Comptroller. During the five-year period, the Surrogate awarded respondent $ 8,613,009.35 in legal fees. Of that amount, a little less than one fourth was net income to respondent (*see Matter of Feinberg, 5 NY3d 206, 213, 833 N.E.2d 1204, 800 N.Y.S.2d 529 [2005]*). In May 2002, after respondent learned that an article was about to

appear in a newspaper concerning his receipt of excessive fees, he met with the Surrogate who directed him to submit, nunc pro tunc, affidavits of legal services detailing the work respondent completed on estate files from the date of his appointment. He did so, but not a single fee was adjusted by the Surrogate (*see Matter of Feinberg, 57 AD3d 1087, 868 N.Y.S.2d 413, 2008 N.Y. App. Div. LEXIS 9234* [decided herewith]).

Respondent asserts that review of the affidavits by the Attorney General did not result in any adjustments either. Respondent also handled these legal matters without adequate preparation (*see* Code of Professional Responsibility DR 6-101 [a] [2] [*22 NYCRR 1200.30 (a) (2)*]) (charge III). Specifically, after his appointment as counsel to the public administrator, rather than review and properly discharge his obligations pursuant to *SCPA 1108 (2) (c)*, respondent regularly requested the same percentage fee drawn from the estates. Moreover, his fee requests were submitted on post-it notes attached to the formal decree instead of the required affidavits of legal services.

In determining an appropriate disciplinary sanction for respondent's serious professional misconduct, we conclude that respondent failed to ethically discharge his public trust as counsel to the public administrator in a manner consonant with his duties under the SCPA and the Code of Professional Responsibility. We have further considered that he charged excessive fees over a five-year period, collected the fees in violation of a clear statutory mandate designed to protect the funds of the estates

he was representing, and the total fees collected were substantial. We also note the condemnatory language set forth in the Court of Appeals decision removing the Surrogate and stating that the taint of favoritism in the matter was strong (*Matter of Feinberg, 5 NY3d at 216*). To his credit, we note respondent's unblemished public disciplinary record. In view of all the circumstances presented, and in order to deter similar misconduct, protect the public, and preserve the reputation of the bar, we conclude that respondent should be suspended from practice for a period of two years.

Mercure, J.P., Spain, Rose, Kane and Stein, JJ., concur.

ORDERED that respondent is found guilty of charges II and III of the petition of charges as charged and specified; and it is further

ORDERED that charge V is dismissed with respect to respondent; and it is further

ORDERED that respondent is suspended from the practice of law for a period of two years, effective 20 days from the date of this decision, and until further order of this Court; and it is further

ORDERED that respondent, for the period of suspension, is commanded to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another; and respondent is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its

application, or any advice in relation thereto; and it is further

ORDERED that respondent shall comply with the provisions of this Court's rules regulating the conduct of suspended attorneys (*see 22 NYCRR 806.9*).

Mercure, J.P., Spain, Rose, Kane and Stein, JJ., concur.

ENTER:

MICHEL J. NOVACK
CLERK OF THE COURT

APPENDIX C
Order of New York Court of Appeals on Motion for Leave to Appeal (Dated February 17, 2009)

COURT OF APPEALS OF NEW YORK

In the Matter of LOUIS R. ROSENTHAL, an Attorney.

Appellant.

COMMITTEE ON PROFESSIONAL STANDARDS,

Respondent.

Motion for leave to appeal denied. Motion for a stay dismissed as academic

APPENDIX D
AMENDMENT XIV TO THE UNITED STATES CONSTITUTION. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of

representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E
Amendment V to the United States Constitution. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U.S.
FILED
JUN 9 - 2009
OFFICE OF THE CLERK

No. 08-1424

IN THE

Supreme Court of the United States

LOUIS R. ROSENTHAL,

Petitioner,

v.

COMMITTEE ON PROFESSIONAL STANDARDS, APPELLATE DIVISION, SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons for this Court to grant the Petition when the only asserted error involves erroneous factual findings and the misapplication of a properly stated court rule by the New York State Supreme Court, Appellate Division, Third Department, in its decision determining that since no issues of fact were presented with respect to Petitioner's attorney disciplinary matter, no hearing was warranted under the circumstances.

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INTRODUCTION

At the outset, Petitioner has presented no "compelling reasons" for his Petition for a Writ of Certiorari to be granted ("Petition"). See Sup. Ct. R. 10. It is clear that Petitioner is dissatisfied with the decision by the New York State Appellate Division, Third Judicial Department suspending him from the practice of law for two years. *Matter of Rosenthal*, 57 A.D.3d 1085 (3rd Dept. 2008). The entire record of Petitioner's disciplinary case stems from his misconduct while he served as former Kings County Counsel to the Public Administrator from 1997 to 2002. In his Petition, Petitioner raises irrelevant and self serving facts that have no bearing on the ultimate issues that he charged and collected excessive fees while serving as counsel to the public administrator, failed to properly discharge his office and handled legal matters associated with that office without preparation adequate under the circumstances. *See*, New York Lawyer's Code of Professional Responsibility, DR's 2-106(A)&(C)(3) (22 NYCRR § 1200.11) and 6-101(A)(2)(22 NYCRR § 1200.30). There has been no showing that the New York State Supreme Court, Appellate Division, Third Department abused its discretion in its decision resolving facts against Petitioner which obviated the need for a hearing. Petitioner's constitutional rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution to the United States were not implicated by the Appellate Division decision.

An important point for this Court to consider is that the Respondent Committee on Professional Standards served Petitioner with a motion pursuant to 22 NYCRR

§ 806.5 seeking an order determining that no factual issues were raised in Petitioner's disciplinary proceeding. That motion is the equivalent of a motion for summary judgment in a civil matter and the rule provides in relevant part, "The court shall refer issues of fact to a judge or referee to hear and report. If no factual issue is raised, the court may, upon application of either party, fix a time at which the attorney may be heard in mitigation or otherwise, or the court may refer the matter for such purpose." Respondent's 806.5 motion annexed evidence and exhibits supporting the disciplinary charges which included Petitioner's sworn testimony before the New York State Commission on Judicial Conduct in a proceeding to remove former Kings County Surrogate Michael H. Feinberg. Although Petitioner was not a party to that proceeding, he appeared as a witness and his testimony revealed that while he served as Kings County Counsel to the Public Administrator from 1997 to 2002 he (1) failed to comply with New York State Surrogate's Court Procedure Act § 1108(2)(c); (2) only started to do so when he learned his systematic failure was being reported in the New York Daily News; (3) began to prepare nunc pro tunc affidavits after the fact; and (4) failed to properly review the Surrogate's Court Procedure Act when he assumed his position. The evidence presented to the Appellate Division established that Petitioner charged and collected excessive fees in contravention of Surrogates Court Procedure Act § 1108(2)(c) by failing to submit affidavits of legal services specifically required by that statute and failed to properly handle all legal matters associated with his position as counsel to the public administrator. It is submitted that the Appellate Division considered all evidence and appropriately determined

that no factual issues were presented which warranted the appointment of a referee to hear testimony and report to the Court. Petitioner was granted the opportunity to appear before the Appellate Division and in fact did so on October 7, 2008 to explain his conduct and present mitigation. All aspects of procedural due process were complied with, including adequate notice of the charges, a neutral decision maker concerning his conduct, right to counsel, right to a decision based upon the record with stated reasons for the decision and opportunity to be heard before the Appellate Division. There was no denial of Petitioner's right to a hearing under the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

New York Code of Rules and Regulations 22 NYCRR Part 806 governs the Conduct of Attorneys in the New York State Supreme Court, Appellate Division, Third Judicial Department. 22 NYCRR § 806.2 Professional Misconduct Defined provides:

> Any attorney who fails to conduct himself or herself in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law, and any attorney who violates any Disciplinary Rule of the Code of Professional Responsibility adopted jointly by the Appellate Divisions of the Supreme Court, effective September 1, 1990, or any other rule or announce standard of the court governing the conduct of attorneys, shall be deemed guilty of professional conduct with

> meaning of subdivision 2 of section 90 of the Judiciary Law. that an attorney who fails to conduct himself or herself in conformity with the standards of conduct imposed upon members of the bar and who violates any Disciplinary Rule of the Code of Professional Responsibility shall be deemed to be guilty of professional misconduct with meaning of subdivision 2 of section 90 of the New York State Judiciary Law.

By order dated May 23, 2005 the Appellate Division, Second Judicial Department transferred a sua sponte inquiry commenced by the Grievance Committee of the Second and Eleventh Judicial District to the Appellate Division, Third Department. Petitioner was requested by Respondent to respond to the allegation that from January 1997 to May 2002 while he served as Kings County Counsel to the Public Administrator he failed to comply with New York State Surrogate's Court Procedure Act § 1108 which required him to submit affidavits of legal services detailing time spent and work performed by him on each file and the method he arrived at in calculating and seeking fees. Further, Petitioner was requested to respond to the allegation that he requested and received excessive fees since he failed to comply with Surrogate's Court Procedure Act § 1108(2)(c) and failed to properly discharge his position as Kings County Counsel to the Public Administrator. Petitioner responded to the allegations and was provided notice and an opportunity to present his position.

After conclusion of Respondent's investigation, on December 13, 2007 Respondent served Petitioner with disciplinary charges pursuant to 22 NYCRR § 806.5. That provision provides:

> Upon determining that a disciplinary proceeding should be instituted, the committee shall file with the court the original and one copy of the notice of petition and petition of charges with proof of service of a copy upon the attorney. Service of the notice and petition shall be made either personally or by certified mail. If service is made by certified mail and he attorney shall fail to answer or respond within the time specified by the notice, a copy of the notice and petition shall be served upon the attorney personally. The court shall refer issues of fact to a judge or referee to hear and report. If no factual issues are raised, the court may, upon application of either party, fix a time at which the attorney may be heard in mitigation or otherwise, or the court may refer the matter for such purpose.

Charge I of the petition of charges alleged that in his capacity as Kings County Counsel to the Public Administrator, Petitioner violated Disciplinary Rules 2-106(A) and (C)(3) (22 NYCRR § 1200.11) of the New York Lawyer's Code of Professional Responsibility by charging and collecting excessive fees as Kings County Counsel to the Public Administrator, as he failed to comply with Surrogates Court Procedure Act § 1108(2)(c) from 1997 to 2002. The charge further

alleged that due to his systematic failure to comply with this statute from 1997 to 2002 he received $8,613,099.35. Finally, it was alleged that in May 2002 after he learned that an article was to appear in the New York Daily News concerning his receipt of excessive fees, Petitioner met with the Surrogate who directed him to submit affidavits, *nunc pro tunc*, detailing work he performed between 1997 and 2002. Charge II of the Petition of Charges alleged that Petitioner violated Disciplinary Rule 6-101(A)(2) (22 NYCRR § 1200.30) of the New York Lawyer's Code of Professional Responsibility by handling matters without preparation adequate under the circumstances. It was alleged that after he was appointed as Kings County Counsel to the Public Administrator in 1997 he failed to properly discharge his office or review his statutory obligations under New York Surrogate's Court Procedure Act § 1108(2)(c). Petitioner regularly requested a six percent fee drawn from an estate when he filed an accounting with the court and then requested an additional two percent fee from the gross value of the estate when he submitted a final decree to the court. The total fee he requested in which he acted as counsel to the public administrator was eight percent of the appreciated value of the estate at the time of the final decree. Petitioner submitted his fee requests on post-it notes rather than by filing affidavits of legal services.

By answer dated January 26, 2008 petitioner denied both charges. On February 27, 2008 Respondent served Petitioner with a motion pursuant to 22 NYCRR 806.5 of the Rules of the Appellate Division, Third Department seeking an order declaring no factual issues were raised which warranted referral of the matter to a

referee for a fact finding hearing. The motion included Petitioner's sworn testimony before the New York State Commission on Judicial Conduct on January 8, 2004 in a proceeding to remove Kings County Surrogate Michael H. Feinberg. Petitioner's testimony and the admissions he made in that proceeding fully supported the two disciplinary charges. Petitioner submitted written opposition to the motion on March 14, 2008. On August 25, 2008 the Appellate Division, Third Judicial Department granted Respondent's motion and on October 7, 2008 Petitioner appeared before the Appellate Division, Third Department and was provided the opportunity to present his position and mitigation. By decision dated December 4, 2008 the Appellate Division determined that Petitioner charged and collected excessive fees in contravention of Surrogate's Court Procedure Act § 1108(2)(c), failed to properly discharge his office as Kings County Counsel to the Public Administrator and handled legal matters without adequate preparation for over a five year period. Petitioner was suspended from the practice of law for two years.

By decision dated February 17, 2009 the New York State Court of Appeals denied Petitioner's motion for leave to appeal and for a stay pending appeal based upon Petitioner's claim that the Appellate Division decision violated his right to a hearing as guaranteed by the due process clause of Article 1, § 6 of the New York State Constitution and the due process clauses of the Fifth and Fourteenth Amendment to the Constitution of the United States.

REASONS FOR DENYING THE PETITION

The decisions of the Appellate Division, Third Department and New York State Court of Appeals were correct and do not amount to denial of Petitioner's right to a hearing as guaranteed by due process clauses under the Fifth and Fourteenth Amendments to the United States Constitution.

A. The Appellate Division, Third Judicial Department's decision declaring that no factual issues were raised as part of Petitioner's disciplinary case was properly decided and based upon evidence presented to the court by both Petitioner and Respondent.

Under the New York statutory scheme, the Appellate Division is granted exclusive power to remove from office any attorney who is guilty of professional misconduct. New York Judiciary Law § 90.

Petitioner was served with detailed disciplinary charges notifying him of what section of the New York Code of Professional Responsibility it was alleged he violated. He was also apprised what specific conduct on his part constituted a violation of the New York Code of Professional Responsibility. Petitioner served an answer denying the charges and was represented by counsel at the investigatory stage and before the Appellate Division and Court of Appeals.

Petitioner asserts that comparison of the two disciplinary charges and his answers thereto demonstrated that there were issues of fact which

warranted a hearing. In response to the charge that Petitioner charged and collected excessive fees in violation Disciplinary Rule 2-106(A)&(C)(3) (22 NYCRR § 1200.11) of the Code of Professional Responsibility and Surrogates Court Procedure Act § 1108(2)(c) by failing to submit affidavits of legal services from 1997 to 2002, his answer stated:

> At best it was a technical error which was cured by respondent's filing of nunc pro tunc affidavits. . . In so far as this charge alleges respondent "collected" excessive fees in contravention of SCPA § 1108(2)(c) and thus violated DR 2-106 (A). . . That disciplinary rule is intended to apply to situations where a lawyer is dealing directly with a private client. . . The responsibility for determining whether the fee should be awarded in the absence of an affidavit of legal services was the Court's responsibility, not respondent's. . . Assuming arguendo the above defense is not sustained, the respondent admits he was awarded fees as the PA's counsel in the absence of an affidavit of legal services in violation of § 1108(2)(c).

In response to the second charge that Petitioner handled legal matters without adequate preparation under the circumstances in violation of Disciplinary Rule 6-101(A)(2) (22 NYCRR § 1200.30) of the Code of Professional Responsibility, his answer stated:

> Respondent informed himself of that section (SCPA § 1108(2)(c) and was prepared to follow

it but was given bad advice by experienced attorneys whom he hired from Hesterberg & Keller, his predecessors as counsel to the PA and was lulled into thinking the advice was sound when safeguard procedures built into the court system, which he relied upon, failed.

After receipt of respondent's answer dated January 26, 2008, the Committee on Professional Standards served Petitioner with a motion pursuant to 22 NYCRR § 806.5. In support of its motion Respondent annexed Petitioner testimony before the New York State Commission on Judicial Conduct in a proceeding to remove former Kings County Surrogate Michael H. Feinberg. Petitioner's testimony is as follows:

Q. Thank you. Now, at some point in early January, Judge Feinberg appointed you as Counsel?

A. Yes.

Q. He informed you that you were appointed?

A. Yes.

A. He drew a letter, and it was delivered to Hesterberg and Keller telling them that I would be new counsel as of - - I think it was January 6th."

Q. And the appointment was immediate?

A. As of January 6th, yes.

Q. - - as your fee? Thank you. Now, do you now know that SCPA 1108, subdivision 2(c), requires affidavits of legal services to be filed and considered by Surrogates in awarding fees to Counsel to the Public Administrator?

A. Yes.

Q. Between January 1st, 1997, and May 2002, did you do so?

A. No.

Q. Did you submit such affidavits?

A. No.

Q. But you submitted no affidavits?

A. That's correct.

Q. Excuse my English, okay? You submitted no affidavits from the inception of getting the job until and investigation was started by The Daily News?

A. Yes.

Q. Did there come a time when a Daily News article came out on May 13, 2002, about the affidavits and about the 8% fees?

A. Yes.

Q. And did you know about it before it was about to come out?

A. Yes.

Q. For how long?

A. I don't know. A week. Two weeks.

Q. Were changes made concerning what you testified about what the procedures were in this period after the article?

A. We started preparing affidavits in every current case and nunc pro tunc affidavits in past cases.

A. - - in my mind to investigate it, to go over and speak to the clerk. I had a long standing prior vacation planned with the family. I went out of the country to Mexico, where my fourteen year old son was seriously, grievously injured. He fractured his spine and I had to fly him out on a medivac and spend a month in Texas with him at the University of Texas Medical School in - - where was I - - San Antonio, and I was living in and out of - - when we came back - - we had facilities. I took the night shift; my wife took the day shift, and it just escaped me. It just, you know, I didn't do it. I should have done it. I just didn't do it.

Q. Okay. And, now, you got 6% of the value of the estate at the time of the accounting as your fee. What did you get at the time of the final decree that you proposed to the Court?

A. An additional - - not additional 6% on any additional assets and then 2% on the entire estate.

Q. So, you would determine or your office would determine what 8% would be on the new value of the estate, is that correct?

A. Yes.

Q. And would it be fair to say that the way you did this is you put the amount that you were requesting on a post-it note on the proposed decree?

A. My employees did that. It was a long standing practice in the - - going back to my predecessor.

Q. And on the copy you served with the court you put a post-it note with the amount you were seeking?

A. Yes, I believe the request of the clerk and the department - -

> Q. But on the copy that you filed with the court, at the clerk's request of your predecessor, you put a post-it note saying how much your firm was requesting that you'd be earning a total of 8% on the entire amended estate?
>
> A. That's what - - Requesting.

While petitioner states he was unable to appeal the determination reached by the New York State Court of Appeals in *Matter of Feinberg* , 5 N.Y.3d 206, 833 N.E.2d 1204, 800 N.Y.S. 592 (2005) as he was not a party to that proceeding, it should be noted that the Respondent did not rely upon the doctrine of collateral estoppel in its motion pursuant to 22 NYCRR § 806.5. It is obvious that in his Petition, Petitioner is offering explanations for his conduct in the form of mitigation, rather than addressing the substance of the charges against him. Further, the Petitioner raises factual issues in an effort to place his misconduct in context, when in actuality, examination of the record and what was alleged in the charges against him was established to the satisfaction of the Appellate Division, Third Department.

B. Petitioner was afforded due process during all stages of his disciplinary case.

As part of the guarantee of procedural due process, this Court has recognized an attorney in a disciplinary matter is entitled to fair notice of the charge against him or her. *In re Ruffalo*, 390 U.S. 544 (1968). An attorney disciplinary proceeding is an adversary proceeding of a quasi-criminal nature. *In re Gault*, 387

U.S. 1 (1967); *Erdman v Stevens*, 458 F.2d 1205 (2nd Circuit 1972). In any analysis of an alleged procedural due process violation, important consideration should be given to whether the attorney has been afforded fair notice of the charges, an opportunity to explain the conduct at issue and to present a defense to the charges. *In re Oliver*, 333 U.S. 257 (1948). Procedural due process in an attorney disciplinary proceeding does not require that a hearing be given to the attorney, only that there be a fair notice of the charge and an opportunity to explain and defend. *In re Chipley*, 448 F.2d 1234 (1971). The license to practice law in a state is so local in nature that federal constitutional standards have not altered the traditionally wide discretion afforded state courts in the establishment and application of standards of professional conduct with moral character to be observed by their court officers. *Mildner v Gulotta*, 405 F. Supp 182 (E.D.N.Y. 1975); *Erdman v Stevens, supra*. Finally, the provisions of New York Judiciary Law governing disciplining of attorneys have been held not to be violative of due process. *Gulotta, supra*.

It is clear that Petitioner was afforded fair and adequate notice of the charges against him and was provided the opportunity in his answer to articulate his defenses to the charges. The charges were not vague and they provided Petitioner with notice of what particular conduct on his part constituted violations of New York's Code of Professional Responsibility. The Court Rules governing attorney conduct in the Appellate Division, Third Department provide any attorney subject to disciplinary charges with the opportunity to present evidence and call and cross-examine witnesses at a disciplinary proceeding. The rules also provide that

either party may seek an order from the court determining no factual issues are raised and requesting that the case be scheduled for oral argument. There was no abuse of discretion by the Appellate Division in its plenary review of the record and its decision that based upon all evidence presented there was no requirement in these circumstances to appoint a referee to hear testimony and report to the court.

CONCLUSION

Petitioner have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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